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Supreme Court of the United States

October Term 1976
No. 76-524

IN THE MATTER OF THE TRUST KNOWN AS
GREAT NORTHERN IRON ORE PROPERTIES

CHARLES S. ARMS and ELIZABETH P. ARMS,
Petitioners,

vs.

WILLIAM W. WATSON, LOUIS W. HILL, JR.,
HARRY L. HOLTZ, JOSEPH S. MICALLEF,
Trustees of the Great Northern Iron Ore Properties Trust
and
BURLINGTON NORTHERN INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITION DOES NOT PRESENT QUESTION FOR REVIEW ON CERTIORARI

The Petition for Writ of Certiorari herein does not present any question cognizable by this Court on certiorari.

The proceeding herein did not involve a violation or construction of any federal statute and does not present any federal question. Confronted with that situation, the petitioners have attempted to manufacture grounds for certiorari review by this Court, by making the unsupported contention that the Minnesota Supreme Court has misconstrued the commodities clause of the Hepburn Act, 49 U.S.C. § 1(8). (Petition for Cert. 18, 19)

However, the fact is that the Minnesota Supreme Court did *not* undertake to construe the Hepburn Act. (Cert. App. 1) No violation of the Hepburn Act is alleged in the pleadings and no such issue was tried in the trial court. Consequently, there was no construction of the Act for the Minnesota Supreme Court to review.

The proceeding herein was merely a hearing on a Petition by the trustees to the Minnesota District Court of Ramsey County asking for instructions with reference to their powers and duties in administering the Trust. (App. 1) No question concerning the Hepburn Act is presented by the trustee's Petition (App. 1); no question concerning the Hepburn Act is presented by the Arms' Petition to intervene in the proceeding (App. 15); and no question concerning the Hepburn Act is presented by the District Court's Order which allowed the intervention (App. 18).

This plainly is not an action wherein the Hepburn Act or any violation thereof were either alleged or tried by the Court. Moreover, no federal question was ever raised in the trial court. Because of this fact, the Petition herein utterly fails to comply with, and is unable to comply with, the requirements of Supreme Court Rule No. 23 which states:

"The petition for writ of certiorari shall contain in the order here indicated— . . .

(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised *so as to give this court jurisdiction to review the judgment on writ of certiorari.*" (Emphasis supplied.)

Petitioners' failure and inability to comply with Rule 23(f) are fatal deficiencies in the Petition that render it inadequate ". . . to give this court jurisdiction to review the judgment on writ of certiorari."

HEPBURN ACT WAS NOT AN ISSUE IN THE PROCEEDING BELOW

Although the District Court made reference to the Hepburn Act in the memorandum that accompanied its decision, (Cert. App. 45) the only references to the Hepburn Act in evidence appear in a transcript of the testimony of James J. Hill before a congressional committee in 1912 (SR-16, 17) wherein he indicated that the Hepburn Act was one of the considerations that led to the creation of the Trust. The only mention of the

Hepburn Act in the course of the trial below was a voluntary statement to the trial court by counsel for the trustees to the effect that the commodities clause of the Hepburn Act was undoubedly one of the motivating factors that induced the creation of this Trust. (Tr. 149, 167)

Clearly, the commodities clause of the Hepburn Act would have prevented the Great Northern Railway from transporting iron ore that was owned by it. Consequently, the Trust was created in 1906 to own the stock of the companies that had legal title to the ore *properties*. The trustees thus held the ultimate ownership of the iron ore *properties* in Trust, for the benefit of the certificate holders, with a reversion upon expiration of the Trust to Lake Superior Company, Limited, the settlor of the Trust. (App. 4)

Thus, the Great Northern Railway had no interest whatsoever in the ore *properties* and certainly none in the iron ore to be transported. This was a perfectly legal and proper arrangement that made it possible for the Great Northern Railway to have an opportunity to transport the ore and obtain freight revenues without any violation of the commodities clause.

The only reference made to the Hepburn Act by the Minnesota Supreme Court is the following:

> "The Commodities Clause of the Hepburn Act, now 49 USCA, (sic) § 1(8), upon which the court particularly focused, prohibits a railroad from carrying ore mined or produced by it or under its authority or in which it may have any interest, direct or indirect. It is not clear that immediately after the creation of the trust in 1906 Great Northern's carriage of ore mined from the trust properties would have violated the Hepburn Act, for it is not clear that it would have been deemed to have any interest

> in the ore. It was not until 1913 that the railroad acquired Lake Superior's interest in the Trust, and we are not prepared to say that this transfer 7 years later is controlling in ascertaining the intent of the grantor when this trust was drawn. Even if the carriage of the ore were held to be illegal, moreover, it does not follow that this alone would render invalid what is an otherwise valid provision in this trust." (Cert. App. 9)

NEITHER THE TRUST NOR THE RAILROAD HAS ANY INTEREST IN THE ORE SHIPPED IN INTERSTATE COMMERCE

The Great Northern Iron Ore Trust does not engage in mining operations. Rather, it leases the ore properties to mining companies on long term mining leases. Consequently, the Trust does not own or have any interest in the iron ore when it is shipped in interstate commerce.

A lease of mining properties is unlike an ordinary lease that merely gives the lessee possession, use and enjoyment of the demised premises. A mining lease gives the lessee the right to take and remove all of the ore that can be extracted from the premises during the term of the lease. It is in reality a sale of all of the ore that the lessee can mine during the term of the lease at the royalty rate prescribed in the lease. Clearly, the "sale" of each ton of ore mined is completed upon its delivery.

By the time each ton of ore is placed in a railroad car for transportation, delivery has been accomplished, title is complete in the lessee mining company and the Trust has no remaining interest "direct or indirect" in that [illegible]e. It is at this same point in time that the iron ore first becomes an "article or commodity" that is capable of being transported in inter-

state commerce and it is then owned absolutely by the lessee mining company.

It is obvious that the ore *properties*, the lands from which the ore is extracted, are not "articles or commodities" that are susceptible of being shipped in interstate commerce. Consequently, even after the Great Northern Railway acquired Lake Superior Company's reversionary interest in the Trust in 1913, seven years after the Trust was created, it did not acquire any interest "direct or indirect" in any "article or commodity" that was capable of shipment in interstate commerce. Moreover, the railroad has never had "any interest direct or indirect" in the royalties that have been received by the trustees and distributed to the certificate holders.

The Hepburn Act has no prohibition on ownership of mines or other properties. It merely prohibits a railroad from transporting in interstate commerce "any article or commodity. . . manufactured, mined, or produced by it, or under its authority, or in which it may have any interest, direct or indirect . . .". No question involving the Hepburn Act can occur until such time as the Burlington Northern railroad comes into possession of the ore properties, and then, only if it should transport over its own lines ore which it mines itself or in which it has an interest. The language of the Hepburn Act does not prevent Burlington Northern from coming into possession of a reversionary interest—it will only prevent Burlington Northern from transporting ore over its own lines if it has a proscribed interest in the ore.

CONCLUSION

There is no issue involving the Hepburn Act that is presented by this case and no issue presented for judicial review on certiorari.

Respectfully submitted,

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